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Supreme Court of the United States

October Term, 1965

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SUPREME COURT, U.S.

No. 985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

RESPONSE TO PETITION FOR AN APPEAL AND MOTION TO DISMISS

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RESPONSE TO PETITION FOR AN APPEAL AND MOTION TO DISMISS

OPINIONS BELOW

The opinion of the State Corporation Commission of Virginia is reported at 1964 S.C.C. Rep. 95. The opinion of the Supreme Court of Appeals of Virginia is reported at 206 Va. 517, 145 S.E. 2d 227. Both of said opinions are found in the Appendix to Statement as to Jurisdiction filed by the appellant with this Court.

PRELIMINARY STATEMENT

The Colonial Pipeline Company, hereinafter referred to as appellant, was assessed by the State Corporation Commission, hereinafter referred to as Commission, with taxes on money and intangible personal property pursuant to Article 9, Chapter 12, Title 58, Code of Virginia (1950)

as amended. Appellant paid the tax and thereafter proceeded to file a claim for refund under the provisions of Section 58-1122, Code of Virginia. The application for refund was heard by the said Commission, which, under the provisions of the Virginia Constitution and under the statutes, is a judicial body. The Commission denied the application for refund. The comprehensive opinion issued by the Commission is found on pages 24 to 35 of Record No. 6051 (red pamphlet). Under the Virginia procedure an appeal is granted as a matter of right from a judgment entered by the Commission to the Supreme Court of Appeals. Upon the appeal, the Supreme Court of Appeals affirmed the order of the Commission denying the refund.

Appellant now seeks an appeal to this Court contending that the act under which the tax is imposed is a violation of the Constitution of the United States. It is stated in the Statement as to Jurisdiction filed by the appellant (hereinafter sometimes referred to as Brief or Petition for an Appeal) the jurisdiction of this Court is invoked under 28 U.S.C., Sections 1257(2) and 2101(c). The mere fact that the appellant has been consistent in its position that the statute (Chapter 217, Acts of the General Assembly of Virginia (1964)) so far as it amended Section 58-588, is unconstitutional, does not bring the constitutionality of the same into substantial question. There is nothing new about appellant's position. The issues it attempts to assert here have already been resolved against appellant's position as a result of principles laid down by this Court in the decided cases.

THE STATUTES INVOLVED

Chapter 12, Title 58, Code of Virginia (1950) deals with the taxation of public service corporations. There are

seventeen articles of this chapter. Article 9, entitled "Pipeline Transmission Companies" contains the sections of the Code which imposed the tax complained of in this proceeding on the appellant (Colonial Pipeline Company), they being Sections 58-588, 58-593 and 58-594. Said Article 9 was amended extensively by Chapter 217, Acts of the General Assembly of Virginia of 1964. A copy of that chapter is found in the Appendix to this response.

The pertinent sections of said article are as follows:

Chapter 12, Title 58, Code of Virginia
Public Service Corporations

* * *

Article 9.

Pipe Line Transmission Companies

§ 58-588. REPORT REQUIRED.—Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit natural gas *or crude petroleum and the products or by-products thereof* in the public service by means of a pipeline or pipelines in this State, which pays no State franchise tax on its gross receipts on account of the transmission of such natural gas or crude petroleum and the products or by-products thereof shall report annually on or before the fifteenth day of April to the State Corporation Commission all of its real and personal property of every description, tangible and intangible, as of the beginning of the first day of January preceding, showing particularly in what city, town or county and school district therein the property is located. This report shall be itemized as provided for herein. Each such corporation shall also report the total miles of mains located in this State.

The report herein required shall be verified by the oath of the president or other proper officer or person making the same.

This section as amended shall apply to the tax year beginning on January first, nineteen hundred and sixty-four and to each tax year thereafter. (Italicized words were added by the amendment in 1964)

§ 58-590. ASSESSMENT BY STATE CORPORATION COMMISSION.—The State Corporation Commission shall, after thirty days' notice previously given the president or other proper person, assess the value of the property of each such corporation and shall assess the franchise tax hereinafter provided for.

Should any such corporation fail to make the reports required by this article on or before the fifteenth day of April of each year, the State Corporation Commission shall, at such time as it may elect, upon the best and most reliable information that can be procured, assess the value of the property of such corporation and may, in the execution of such duty, send for persons and papers.

The State Corporation Commission shall assess upon such property the State taxes, if any, imposed thereon by law.

A certified copy of the assessment of State taxes when made shall be immediately forwarded by the clerk of the State Corporation Commission to the Comptroller and to the president or other proper officer of each such corporation.

§ 58-593. RATE OF STATE TAX ON INTANGIBLES.—The State tax on the intangible personal property (other than shares of stock and bonds issued by counties, cities and towns or other political subdivisions of this State), owned by every corporation falling under the provisions of this

article, shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof.

§ 58-594. RATE OF STATE TAX ON MONEY.—The State tax on the money of every corporation coming under the provisions of this article shall be twenty cents on every one hundred dollars of the assessed value thereof.

STATEMENT OF THE CASE

Appellant seeks to solicit the sympathy of the Court by bemoaning the fact that it paid for 1964 a tax on its intangibles greater than all the other utilities of Virginia except railroads. However, the real reason for this situation is that appellant is a huge corporation and for its own convenience saw fit and did invest its tremendous holdings in intangible property in non-exempt tax securities. Appellant artfully compares its tax liability to those public utilities which are not comparable to it and has deliberately omitted the tax paid by railroads in such a comparison. Appellant is chartered as a common carrier of crude petroleum and the products or by-products thereof. Its pipeline passes through the entire State and extends to other portions thereof. In size and undertaking it is comparable to a large railroad system. If the tax paid by railroads are included along with other public utilities, appellant paid less taxes in 1964 on its intangible property and money than did all the other utilities. Certain figures, showing the extent of appellant's holdings and tax liability are compared with the holdings and taxes paid by all other utility companies in Virginia, were placed in evidence. This evidence was ruled out by the Commission as irrelevant (R. 12). To counter this evidence, the Commonwealth introduced Exhibits 6, 7, 8 and 9, which included figures relative to rail-

roads. For illustration, taking the figures for the year 1964 (Exhibit 6) we have:

	Assessed value of tangible property	*Taxes on intangible property*	*Tax on Money*
All Utilities	$884,586,924	$134,637	$68,438
Colonial Pipe Line	$ 10,298,959	$123,450	$38,979

As stated in the petition for an appeal, appellant was first incorporated in Delaware in 1961, and it was converted into a Virginia corporation in October, 1962, by the merger of the Colonial Pipeline Company of Virginia. As it was a public service corporation, it was necessary for it to be domesticated in Virginia; that is, become a Virginia corporation before it could perform its function as a public service corporation and exercise the right of eminent domain. After October, 1962, appellant exercised the right of eminent domain in Virginia, acquiring extensive holdings represented by rights-of-way in real estate during 1962 and 1963. According to the assessment of the State Corporation Commission based on the report made by appellant under Section 58-588 of the Code, it had tangible property in Virginia having a value of more than $25,000,000.00.* The source of the money and funds used to purchase the commercial paper (intangible property) involved in this case was loans from institutional investors to raise funds to pay for the construction of the pipeline by the appellant. During 1962, 1963 and 1964, appellant was in the process of constructing its lines and not engaged to

* In determining the assessed value, the State Corporation Commission computes 40% of the value of the physical property of the taxpayer.

any extent in transporting by-products of petroleum. It should be borne in mind that none of this money was derived from operations of the appellant in any specific locality. As a Virginia corporation, appellant became liable for taxes and for other responsibilities imposed by the laws of Virginia. In exercising the right of eminent domain in Virginia, all appellant's assets were subject to claims of the property owners from which it took property, and such claims could be enforced by the Virginia courts from said assets.

Appellant, on page 6 of the Statement As To Jurisdiction, in effect states that the amendment to Section 58-588 came as a shock and a great surprise, and that it understood it would be taxed in the same way as corporations that were not public service corporations. We are therefore constrained to make the following observation:

Appellant, during 1962 and 1963, commenced its vast program to acquire property (rights-of-way) on which to construct a pipeline through the State of Virginia, including the spur lines. The system embraced some five hundred miles. The real property (rights-of-way) was acquired by purchase and eminent domain. As we have already stated, the value of appellant's tangible property in Virginia as of January 1, 1964, amounted to some twenty-five million dollars. This property was located in many of the counties throughout the State. Physical (tangible) property of all persons and corporations other than public service corporations is assessed by local officials of the counties or cities wherein such property is located. The physical or tangible property, including real estate, of public utility corporations is assessed by the State Corporation Commission. During the fall of 1963 the question arose as to

how to tax this physical property of the appellant. To have been included in the ambit of said article 9, Title 58, in the long run would be an advantage to the appellant because thereunder the tangible (real and personal) property is assessed by the State Corporation Commission rather than the local authorities (Section 58-590) and depreciation of the cost is allowed, whereas local assessments are on the ascending scale. Likewise, it would have been an advantage to the Commonwealth to have the assessments made by the State Corporation Commission as this would simplify and systemize the taxing procedures. As early as August, 1963, appellant's authority to exercise the power of eminent domain by certain land owners was challenged by certain land owners and litigation ensued. *Ferguson, et al.* v. *Colonial Pipeline Company,* 206 Va. 719, 146 S.E. (2d) 173, and *Peck Iron Company* v. *Pipeline Company,* 206 Va. 711, 146 S.E. 2d 169. In both the *Peck* case, *supra,* and in the case of *Ferguson, et al, supra* (both of these cases were instituted in 1963) appellant asserted in its petitions for condemnation:

> "1. It is a Virginia public service corporation whose business is the transportation of petroleum products and/or any liquids or gases by pipelines as a common carrier for the public. . . ."

See, page 2 of Record 5937, *Peck* case, *supra,* and page 2 of Record 6089, *Ferguson* case, *supra.*

Months after the filing of its petitions in the trial courts, on appellant's motion the courts permitted amendments to other paragraphs in the petitions, deleting the words "and any other liquids or gases." By alleging that it was a Virginia public service corporation whose business it was to

transport as a common carrier "gases by pipeline," appellant certainly must have felt, in 1963, that it was a pipe line transmission company and a public utility and it was included in said Article 9, Chapter 12. Now public service corporations are taxed under Chapter 12, Title 58. The only article of that chapter that appellant could fall under would certainly be Article 9 (§ 58-588 to 601, inclusive). It is inconceivable that appellant, who was and is represented by one of the most outstanding law firms in Virginia, was not fully advised in 1963 of its tax status of the possibility that it was covered by an appropriate amendment to the statute in 1964. This probability certainly enhanced when the Commission expressed in its opinion in the case of *Commonwealth ex rel White and others* v. *Colonial Pipeline Company,** Case No. 16552, October 24, 1963, that Section 58-588 did not cover appellant.

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* The case of Commonwealth of Virginia at the relation of *Mary V. White, et al.,* Case No. 16552, 61 Report of the State Corporation Commission of Virginia, page 82, was a proceeding instituted by various landowners who sought a declaratory judgment that appellant does not possess the power of eminent domain and an injunction forbidding it to assert that power. The Commission dismissed the cases for the lack of jurisdiction. However, in its opinion the Commission stated: "The Code nowhere contains a definition of a pipeline company. It confers on the Commission authority to regulate and tax natural gas pipeline companies, but confers on it no authority to regulate or tax petroleum pipeline companies." This opinion was issued on October 24, 1963. It put at rest the question of whether or not the provisions of Article 9, Title 58, were applicable to appellant. It was notice to the taxing authorities and to the appellant that under the existing statute (58-588 of the Code) the appellant (a petroleum pipeline company) was not covered. Inasmuch as the transmission of petroleum and petroleum products by pipelines in all particulars and character was the same as the transmission of natural gas by pipelines, it was obvious that the public service corporations which transmitted petroleum and petroleum products as common carriers should be taxed in the same manner as the public service corporations which transmit natural gas as common carriers. The convening of a special session of the General Assembly was eminent. However, as the session (November-

Of course, no one could have stated definitely in 1963 what the Virginia General Assembly would do in 1964. Appellant's argument is to the effect that if it had known that the tax would be imposed on its money and intangibles, it would have converted the same into tax exempt securities such as United States bonds, etc. With its eyes wide open the appellant was in a position to know in all probability that there would be amendments to the tax statutes offered in the 1964 General Assembly which would affect the tax status of appellant and the statutes most likely to be amended would be those sections of Article 9, Chapter 12, Title 58, of the Code, *namely, Sections 58-588 et seq. To* be included in the coverage of Article 9 would be an advantage to the appellant as it could bolster its contention that it is a public utility and therefore has the right of eminent domain. Also to be included in the coverage of said Article 9 (58-588 *et seq.*) would mean that the State Corporation Commission would make the assessment of appellant's properties and would obviate the necessity of appellant dealing with many different local officials.

Obviously, one of the purposes of amending portions of Article 9, namely (§ 58-588) was to make it possible to tax the physical properties of appellant in the same way which such property of other public utilities (pipeline transmission companies) was taxed. It was necessary to

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December, 1963) was limited to consider the question of reapportionment, it was not feasible to enact general legislation at that session. However, the regular session was going to convene in January, 1964. It was obvious to anyone close to the situation that in all probability there would be an attempt to amend the provisions of Article 9 of Chapter 12, Title 58, of the Code so as to affect the appellant. It is interesting to note that appellant employed Ralph H. Ferrall (of counsel for appellant) as a lobbyist for the 1964 session of the General Assembly. This is shown by the records of the Secretary of the Commonwealth, of which this Court as well as the Supreme Court of Appeals can take judicial knowledge.

make the amended statute effective January 1, 1964, in order to cover the taxes for the current year (that is, the year in which the statute was amended, 1964).

QUESTIONS PRESENTED

1. Is a State statute in violation of the Constitution of the United States which imposes a tax for the current year based on the taxpayer's property held January first of the year in which the statute was enacted?

2. Is the State of incorporation prohibited by the Constitution of the United States from taxing the intangible property of a corporation where the evidence of such intangible property is held in other States and where the money with which the intangibles were purchased was not derived through the operation of the business of such corporation but by the negotiation of loans and where there is no showing that such intangible property is taxed or could be taxed by the States wherein it is held?

ARGUMENT

I.

Application of the Statute to Appellant So As to Require It to Pay Taxes on Its Intangible Property Held By It on January 1, 1964, is Valid

Appellant argues that an unexpected retroactive tax that would have been avoided is unconstitutional. Brief pages 8-10 inclusive.

The tax here imposed was a tax for the current year. The General Assembly of Virginia always meets after January first. Nevertheless, it revises the tax structure of Virginia so as to relate back to that date. If appellant's argument were sound, then the General Assembly could

never revise taxes for any period prior to the date it passes a tax statute. This just is not so and is contrary to what actually happens both on the State and Federal level.

The appellant argues that the taxes imposed by this statute are unfair, oppressive and discriminatory and deprive the appellant of its property without due process of law in contravention of the Constitution of the United States. It bases this argument on the ground that the appellant had no reason to believe that before January 1, 1964, these taxes would be imposed, and had it had such a reason, it could have avoided or minimized the incidence of these taxes. If such an argument is sound, then no tax statute having retroactive effect would ever be valid, because any person could always claim that he could minimize the incidence of the tax by taking the proper steps, had he known that the tax was going to be imposed.

Whether a statute enacted during the taxable year, levying a tax on wealth held by the taxpayer on January first of that year could be classified as retroactive legislation is debatable. If this legislation is considered retroactive as that term is used in the Federal and State Constitutions, then the issue presented is: Whether a State may enact a tax statute directing that it shall take effect on a date prior to its enactment. Unless this type of legislation is expressly condemned by the United States Constitution, the same is valid. What then is the portion of the Constitution of the United States condemning retroactive legislation?

The Federal Constitution contains this provision: Article I Section 10:

> "No State . . . shall . . . pass any bill of attainer, *ex post facto law,* or *law impairing the obligation of contracts,* or grant any title of nobility." (Italics supplied.)

The pertinent part of the Fourteenth Amendment is:

> "nor shall any state deprive any person of life, liberty or *property*, without due process of law." (Italics supplied)

There must be a vested right in property which is diverted by the operation of the retroactive statute before it can be condemned as being in violation of the Constitution. A person has no vested right not to pay taxes. A person has no vested interest in a tax assessment. The only type of retroactive tax statute which has been condemned is that involving the so-called "gift tax" cases* where the statutes have been applied to transactions (gifts) which have been consummated and the property vested thereby years and years before the legislation was enacted and a hardship has or may result from such application.

Perhaps one of the leading cases on the subject is that of *Welsh* v. *Henry*, 305 U.S. 134, 83 L. Ed. 87 (1938). In that case, the validity of a Wisconsin statute enacted in 1935 imposing a tax on corporate dividends received by the applicant in 1933 was questioned. The Court stated on page 146 (305 U.S.), p. 93 (83 L. Ed.):

> "The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. *Milliken* v. *United States*, 283 U.S. 15, 21, 75 L. ed. 809, 814, 51, S. Ct. 324, and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among

* Referred to as page 8 of brief.

> those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."

Property taxes and benefit assessments on real estate may be retroactively applied. *Wagner* v. *Leser,* 239 U.S. 230, 60 L. Ed. 206. The Court in its opinion stated:

> "It is first contended that the complainant is deprived of its property without due process of law, because the special assessment levied upon its property is for the special benefits long since accrued, and that the statute under consideration is retrospective in its operation, thereby disturbing rights which had accrued to and become fixed in the property holders long before the passage of the statute; that the state had no authority because of benefits thus long since conferred to make the assessment in question. But we deem this contention foreclosed by the decision of this court in *Seattle* v. *Kelleher,* 195 U.S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44." (239 U.S. 236)

Furthermore, it has been held that a delinquent taxpayer has no vested right in the existing mode of collecting taxes. 51 Am. Jur., p. 833—*League* v. *Texas,* 184 U.S. 156, 46 L. Ed. 478, 224 S. Ct. 475.

In the case of *United States* v. *Hudson,* 299 U. S. 498, 81 L. Ed. 371 (1937), the Court upheld the validity of the silver purchasing act which was made applicable to transfers made on or after May 15, 1934, and prior to the date of the act (June 19, 1934). The silver had been purchased by Hudson on May 3, 1934, and sold by him on May 23

and May 29, 1934, all the transactions having been concluded before the enactment of the statute.

Appellant urges this Court to adopt a rule to the effect that a so-called retroactive tax is unconstitutional when the following two conditions are met:

> "(a) if the taxpayer did not have a reasonable expectation that the tax would be imposed on the transaction or condition in question; and
>
> "(b) if the taxpayer could reasonably have been expected to have avoided the tax if he had anticipated its imposition."

We do not agree that such a rule has been established by the reported cases nor do we believe that this Court would be justified in enunciating such a rule. We believe that such anticipation by the taxpayer is wholly immaterial to the issues presented in this case.

Appellant relies on the cases of *Nichols* v. *Coolidge*, 274 U.S. 531 (1927), *Blodgett* v. *Holden*, 275 U.S. 142 (1927) and *Untermyer* v. *Anderson*, 276 U.S. 440 (1928), in which the Court declared the retroactive application of gift tax statutes unconstitutional. Brief, page 8. The case of *Cooper* v. *United States*, 280 U.S. 408 (1929), which is one of the leading cases on the subject and which was decided *after* the two cases listed above. The circumstances of this case were somewhat similar to those of the case at bar, especially in reference to the time element. Mrs. Cooper acquired stock from her husband by gift on November 1, 1921. The gift became vested and absolute on that date. Thereafter, on November 23, 1921, Congress enacted the revenue act effective January 1, 1921. An assessment was made pursuant to the said statute. The taxpayer (Mrs. Cooper) maintained that this was invalid under the due process clause of the Fifth Amendment.

In holding that the tax statute was valid, the Court, through Mr. Justice McReynolds, stated:

> "That the questioned provision cannot be declared in conflict with the Federal Constitution, merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income, has not been open to serious doubt since *Brushaber* v. *Union P.R. Co.* 240 U.S. 1, 60 L. ed. 493, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713, and *Lynch* v. *Hornby,* 247 U.S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543.
>
> "*Nichols* v. *Coolidge, supra,* held arbitrary and capricious a statute which required executors to pay an excise ostensibly laid upon the transfer of property by death, but reckoned upon its value plus the value of other property conveyed by the decedent before the enactment in entire good faith and without contemplation of death, and said that to enforce it would amount to confiscation. *Blodgett* v. *Holden,* 275 U.S. 142, 72 L. ed. 206, 48 Sup. Ct. Rep. 105, and *Untermyer* v. *Anderson, supra,* considered the validity of an enactment which laid a tax upon donors because of gifts fully consummated prior to its passage. We held this was beyond the power of Congress. None of these cases is in point; they gave no consideration to the power of Congress to require that taxable income should include profits from transactions consummated within the year.
>
> "We can find nothing unusual, arbitrary, or capricious in the provision of the taxing act here involved, and the judgment of the court below must be affirmed." (280 U.S. 411-412)

In the case of *Penn-Dixie Cement Corp.* v. *Kizer,* 250 S.W. (2d) 904, 194 Tenn. 412 (1952), the Court sustained the validity of an assessment of an excise tax under a statute which was allegedly retroactive or retrospective

in operation. On January 31, 1951, the statute, imposing an excise tax on corporations for the privilege of doing business in Tennessee measured by the corporation's net earnings for the preceding year, was amended in such a manner as to eliminate the deduction of federal taxes on income or excess profits in computing the net earnings subject to taxation under the statute. The amendment further provided that all taxes *due* on or before July 31, 1951, shall be computed in accordance therewith. Under the statute corporations were required to file a verified report of their net earnings for the preceding year on or before July first of each year and pay the tax at that time. The amendment to the statute provided that the same "shall take effect from and after its passage." The taxpayer brought an action to recover $21,152.03, the additional amount paid resulting from the amending of the statute. It was contended by the taxpayer: (1) that the application of the amendment to earnings made during 1950 violated the provision of the Constitution of Tennessee which prohibits retrospective legislative laws that disturb vested rights and (2) that such application of the amended statute was so "oppressive and arbitrary as to be a denial of due process under the Fourteenth Amendment to the Constitution of the United States." The Supreme Court of Tennessee affirmed the judgment of the trial court denying relief to the taxpayer. In the course of its opinion the Court stated:

> "Contention is made by appellant that the Act is not only void as being retroactive in effect but violates 'due process' under the Federal Constitution. We cannot sustain either of these contentions as being sound.
>
> "Conceding that the Act is in a degree retroactive, or retrospective, this does not in and of itself render it invalid, since in our opinion it does not impair the

obligation of a contract or operate to divest rights to any vested interest. Taxing statutes are generally held to be constitutional even though they have some retroactive effect. *Millikin* v. *U.S.*, 283 U.S. 15, 21, 51 S. Ct. 324, 75 L. Ed. 809 and *Welch* v. *Henry*, 305 U.S. 134, 59 S. Ct. 121, 118 A.L.R. 1142.

" 'Mere retroactivity of a statute affecting taxation does not render it unconstitutional; such a statute is valid if it is not arbitrary, and does not disturb vested rights, impair contractual obligations, or violate due process.' 16 C.J.S., Constitutional Law, § 419.

* * * *

"We find no merit in the fifth assignment of error complaining that the tax as construed by the Commissioner is 'so oppressive and arbitrary' as to be a denial of due process under the Fourteenth Amendment of the United States Constitution. The Federal decisions cited on the appellant's brief, *Nichols* v. *Coolidge*, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, and others do not control the question before us. On the contrary the case most applicable and controlling, as pointed out by opposing counsel, is *United States* v. *Hudson*, 299 U.S. 498, 500, 57 S. Ct. 309, 310, 81 L. Ed. 370, wherein it is said:

> " 'As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution.' " (250 S.W. (2d) 909-910)

On page 9 of brief counsel for appellant quotes from an article by Charles B. Hochman entitled: "The Supreme Court and the Constitutionality of Retroactive Legisla-

tion." 73 Harv. L. Rev. 692, 727 (1960). This is a comprehensive article on the subject of retroactive legislation generally. Only five and one-half pages of the thirty-four pages deal with the subject of Retroactive Taxation, pages 708-711, inclusive. We quote from that work beginning on page 706:

> "*Retroactive taxation.*—Cases involving the retroactive imposition of taxes must be treated separately. The Court has been extremely reluctant to override the legislative judgment as to the necessity for retroactive taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it. Indeed, as early as 1935 one commentator observed that 'arbitrary retroactivity may continue . . . to rear its head in tax briefs, but for practical purposes, in this field, it is as dead as wager of law.' Nevertheless, a discussion of these cases is here included because it illustrates the niceties involved when the Court applies a single factor in determining the validity of retroactive legislation.
>
> "The primary consideration which appears from an analysis of the cases involving retroactive taxation is the ability of the taxpayer, at the time of the transaction in dispute, reasonably to have foreseen that a tax would be imposed, and the *likelihood that, having been able to foresee it,* he *could have altered* his *conduct to avoid* the *tax. Under this standard, no federal income tax has ever been held invalid on the ground that it was retroactive.* It is thought that the taxpayer, even if he had known that the tax would be imposed, would have received the income; therefore, it is not unfair to impose the tax since the taxpayer in no way relied on the nontaxability of the income. Accordingly, several statutes taxing all income re-

> ceived during a calendar year have been sustained even though enacted during the latter part of the year, and one state statute removing the exemption granted for dividends received was upheld as applied to a tax year ending almost fifteen months prior to its passage. Although the taxpayer may have changed his position by spending money he would have allocated to the payment of the tax had he known it would be imposed, it seems unlikely that the Court would find this argument determinative unless the tax were imposed on income received several years prior to the statute. It should be noted that the rule applied to yearly income taxes has also been applied to special income taxes imposed on the profit made from a particular transaction. Thus a fifty per cent tax on profits made from transactions in silver was held constitutional although its effective date was thirty-five days prior to its enactment. Similarly, the Renegotiation Act, which provided for recovery by the United States of excess profits realized by subcontractors, under government war contracts, was held valid as applied to subcontracts entered into prior to its enactment and on which final payment had not yet been made." (Italics supplied)

The appellant has failed to cite one case decided by the Supreme Court of the United States or a lower federal court where the rule he urges this Court to adopt has been approved. To the contrary, the very authority he cites (The Supreme Court and the Constitutionality of Retroactive Legislation by Charles B. Hochman, *supra*) states that no federal income tax has ever been held invalid under this standard. (The ability of the taxpayer, at the time of the transaction in dispute, reasonably to have foreseen that a tax would be imposed, and the likelihood that, having been able to foresee it, he could have altered his conduct to avoid the tax.)

Counsel has referred the Court to the following cases on page 9 of the brief: *Cohan* v. *Commissioner,* 39 F. 2d 540 (2d Cir. 1930); *Wilgard Realty Co.* v. *Commissioner,* 127 F. 2d 514 (2d Cir. 1942); *United Business Corp. of America* v. *Commissioner,* 62 F. 2d 754 (2d Cir. 1933); *Prather* v. *Commissioner,* 322 F. 2d 931 (9th Cir. 1963). None of these cases approve the rule appellant urges this Court to adopt. The validity of the tax statutes, though retroactive, was sustained in those cases. Judge Catterall, who issued the opinion on behalf of the State Corporation Commission, discusses and analyzes each of these cases. In this connection, the Court's attention is invited to pages 32, 33 and 34 of Record No. 6051 (Red).

Appellant's argument in this connection (An Unexpected Retroactive Tax That Would Have Been Avoided Is Unconstitutional) is effectively answered by the Supreme Court of Appeals in its opinion on pages 231 to 232 inclusive, 145 S.E. (2d); on pages 520 to 522 inclusive, 206 Va. and on pages 22 to 26 inclusive of Appendix A attached to Statement As To Jurisdiction filed by the appellant.

II.

The State is Not Prohibited by the United States Constitution in Levying Taxes on All Money and Intangibles of the Appellant.

The second contention made by the appellant is:

> An Unexpected Retroactive Tax That Would Have Been Avoided Is Unconstitutional.

The appellant argues that inasmuch as its intangible property and money allegedly have a commercial domicile in the State of Georgia, the State of Virginia, the State of

incorporation, is thereby precluded (prohibited) under the Constitution of the United States from taxing these same intangibles and money. Commissioner Catterall answers this argument fully and completely on pages 26 to 32 of the record.

On page 11 of its brief appellant states:

> "No Supreme Court case has ever held that a State of incorporation may levy a property tax on all intangibles of its corporation wherever located and regardless of a commercial domicile established outside that State."

We have always been under the impression that a State did not have to look to the Federal Constitution for powers it sought to exercise. Our concept of constitutional law has always been that a State could exercise those powers it saw fit unless expressly prohibited by its own Constitution or by the Constitution of the United States.

In what case has the Supreme Court of the United States expressly held that the State of incorporation is prohibited from taxing intangibles of a corporation which has acquired a situs at "commercial domicile" outside said State?

If there has been such a case decided, we have been unable to find it.

In this connection, appellant relies on the case of *Wheeling Steel Corporation* v. *Fox*, 298 U.S. 193 (1936). That case did not hold that the State of incorporation was prohibited from taxing intangibles having a commercial domicile in another State. All it held was that West Virginia had the authority to tax the intangibles of the corporation (which was incorporated in Delaware) where it was shown that such intangibles had a commercial situs in West Virginia. Delaware was not a party to the suit. To

understand the purport of the *Wheeling* case it is necessary to consider it in the light of the cases then recognized to be controlling and which have long since been repudiated by the Supreme Court of the United States. Those cases culminating in *First Nat. Bank* v. *Maine*, 284 U.S. 312 (1932)), held that intangibles should enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. In other words, during that era the Supreme Court held that to tax the same intangibles in two States was contrary to the due process clause and the ancient doctrine of "mobilia sequuntur personam" did not apply to intangibles when it is shown that the intangibles have not followed the owner and have acquired situs elsewhere. However, as pointed out by Commissioner Catterall, Record 6051, p. 26, and by the Supreme Court of Appeals, 145 S.E. 2d 233, 206 Va. 524-5 the Court in the case of *Curry* v. *McCanless*, 307 U.S. 357 (1939) held that both States could tax the securities owned beneficially by a citizen of Tennessee and held in trust by an Alabama trustee. In the course of the opinion the Court stated:

> "The taxpayer who is domiciled in one State but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. (Citing authorities, including *Wheeling Steel Corporation* v. *Ford*, 298 U.S. 193.) *But taxation of a corporation by a State where it does business, measured by the value of the intangibles used in its business there, does not preclude the State of incorporation from imposing a tax measured by all its intangibles. Cream of Wheat Company* v. *Grand Forks County, supra*, 253 U.S. 329" (307 U.S. 368) (Italics supplied)

An examination of the opinion in *Cream of Wheat Company* v. *County of Grand Forks*, 253 U.S. 325 (1920),

indicates there is no constitutional prohibition against a State taxing intangible property of a corporation although the physical property and *business* of the corporation are entirely in another State. In that case, the Court stated in its opinion:

> "The limitation imposed by the 14th Amendment is merely that a state may not tax a resident for *property* which *has acquired a permanent* situs beyond its boundaries.
>
> * * *
>
> "The limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicile, if, like a sea-going vessel, the property has no permanent situs anywhere. *Southern P. Co.* v. *Kentucky*, 222 U.S. 63, 68, 56 L. ed. 96, 32 Sup. Ct. Rep. 13. Nor has it any application to intangible property (citing cases), even though the property is also taxable in another state by virtue of having acquired a 'business situs' there (citing cases)." (253 U.S. 328, 329) (Italics supplied).

We have found no case decided by the Supreme Court of the United States which overrules the *McCanless* case, *supra*. Subsequent decisions indicate that the doctrine asserted in the *Cream of Wheat* case, *supra*, and reconfirmed in the *McCanless* case have been followed.

The case of *Newark Fire Insurance Company* v. *State Board of Appeals*, 307 U.S. 313, was decided the same day that the case of *Curry* v. *McCanless, supra*, (May 29, 1939).

In a concurring opinion by Justice Frankfurter, joined in by Justices Black, Stone and Douglas, the following statement is made:

"It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended.

"Chapter 236 of the New Jersey Laws of 1918, as applied to the circumstances of these two cases, clearly does not offend the Constitution. In substance, such legislation has heretofore been found free from constitutional infirmity. *Cream of Wheat Co.* v. *Grand Forks County,* 253 U.S. 325, 64 L. ed. 931, 40 S. Ct. 558, affirming 41 N.D. 330, 170 N.W. 863. During all the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered since that case was decided, *the extent* of a state's *taxing power over a corporation of its own creation,* recognized in the *Cream of Wheat Co.* case *has neither been restricted* nor *impaired.*" (307 U.S. 324) (Italics supplied)

Hence, it is clear that the rule laid down in the *Cream of Wheat* case, *supra,* to-wit, that the State of incorporation may tax the intangible property held by the corporation although its entire business is carried on outside the State of incorporation, is now recognized by the Supreme Court of the United States.

Three years after *McCanless* and *Newark Fire Insurance* the case of *State Tax Commission of Utah* v. *Aldrich,* 316 U.S. 174 (1942), reached the Supreme Court. In that case, the respondent's decedent was a resident of New York where he was domiciled at the time of his death. His estate was probated in New York. Included in the estate were shares of stock issued by the Union Pacific Railroad Company. The railroad company was a Utah corporation. The shares of stock were actually held in New York. The railroad company kept its books, records and transfer agents in New York where all transfers of stock were actually made. Nothing was done relative thereto in Utah.

The shares of stock were the only property of the decedent claimed to be within the jurisdiction of Utah. The State of Utah sought to tax the transfer of the stock. The Supreme Court of Utah disallowed the tax under the compulsion of *First National Bank* v. *Maine, supra.* The United States Supreme Court reversed, holding that the State of Utah could tax the transfer of these shares of stock. In the course of the decision, the Court stated:

> "For the reasons stated we do not think that *First Nat. Bank* v. *Maine* should survive. We overrule it. In line with our recent decisions in *Curry* v. *McCanless, Graves* v. *Elliott* and *Graves* v. *Schmidlapp* we *repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one state.* In case of shares of stock 'jurisdiction to tax' is not restricted to the domiciliary State. *Another State* which has extended benefits or protection or *which can demonstrate* 'the practical *fact of its power*' or *sovereignty* as respects the shares (*Blackstone* v. *Miller,* 188 US p. 205, 47 L ed 444, 23 S Ct 277) *may likewise constitutionally make its exaction.* In other words, we *restore* these intangibles to the *constitutional status* which they occupied up to a *few years ago.* See *Graves* v. *Shaw,* 173 Mass. 205, 53 NE 372; *Larson* v. *MacMiller,* 56 Utah 84, 189 P 579; and cases collected in 42 ALR pp. 365 et seq." (Italics supplied).

Hence, what was dictum in *McCanless* became the expressed ruling of the Court in *Aldrich;* that is to say, there is no constitutional restriction on different States taxing the *same* intangible property at the *same* time.

Appellant concedes on page 11 of its brief that the cases cited in the opinion of the State Corporation Commission (R. 24-29) establish that the State of domicile has the

power to tax intangibles. Quoting from the brief on page 11:

> "There was no question of commercial domicile in *Central Hanover* and *Greenough* since those cases involved domiciles of individuals, and not the multi-state problems of corporate operations."

Thus appellant would treat a corporation differently from an individual where the domicile becomes a factor in levying taxes.

Mr. Justice Reed in the case of *Newark Fire Insurance Company* v. *State Board, supra,* stated in the opinion sustaining the tax:

> "When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the jurisdiction, of its creator. There it must dwell. The dominion of the state over its creature is complete." (307 U.S. 318)

The Court, in unequivocal language, stated in the *Cream of Wheat* case, *supra:*

> "The company was confessedly domiciled in North Dakota, for it was incorporated under the laws of that state. As said by Mr. Chief Justice Taney: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' *Bank of Augusta* v. *Earle,* 13 Pet. 519, 488, 10 L. ed. 274, 307. The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile." (253 U.S. 328)

The doctrine enunciated therein was, as we have seen, reaffirmed in the *Newark Fire Insurance Company* case (307 U.S. 324).

Although we deem it immaterial to the issue presented in this case whether the intangibles and cash of the appellant had a so-called "commercial domicile" in Georgia as claimed by the appellant, an examination of the evidence before the Commission indicates that these intangibles and money were not localized to Georgia or to New York, as were the intangibles localized to West Virginia in the *Wheeling Steel* case, *supra*. There was no showing that those intangibles and money were produced by business carried on in Georgia or in New York.

Mr. Carter, the assistant treasurer of appellant, states the source of these funds. We quote from his testimony on pages 14 and 15 of the Record:

> "Q. The first page of this exhibit shows, I believe, about twenty-two million dollars of cash or certificates of deposit of Colonial Pipeline?
> "A. Yes.
>
> "Q. Mr. Carter, what was the source of those funds?
> "A. These were funds secured on long-term loans from financial institutions.
>
> "Q. For what purpose were they secured?
> "A. For the construction of lines.
>
> "Q. Where were they secured?
> "A. In New York City.
>
> "Q. And where were they closed?
> "A. In New York City.
>
> "Q. And all of those were with financial institutions?
> "A. Yes.
>
> "Q. Turning to the next page, that shows about twenty-three or twenty-four million dollars of notes.

What was the source of the money represented by those notes?

"A. This money was also obtained from the same loans made by these financial institutions."

Appellant for its own convenience kept these funds in New York City and in Atlanta. Such keeping did not localize them in the sense to give them a commercial domicile in those States. In the case of *Standard Oil Company* v. *Commonwealth,* 311 S.W. (2d) 372 (Kentucky), relied upon so heavily by appellant, the factual situation was entirely different. There the tax was upon accounts and notes receivable derived from the business operated by Standard in other States and in bank deposits derived from accounts receivable and notes. The operation of the business was separate in each State. We submit that even if the rule in the *Wheeling Steel* case, *supra,* as appellant construes precludes the taxing of intangibles in another State (which rule incidently has long been discarded by the Supreme Court), the evidence in this case fails to establish such a commercial domicile.

The mere holding of these intangibles and money in New York and Georgia does not preclude the State of Virginia from taxing them. Virginia has and had at that time (January 1, 1964) complete control over appellant and could have forced appellant to use these intangibles and money to satisfy any claim which may have been made against appellant. By being incorporated in Virginia as a public service corporation and exercising the right of eminent domain, appellant subjected itself to control by Virginia. Mr. Justice Douglas in the *Central Hanover Bank & Tr. Co.* v. *Kelly,* 319 U.S. 94 (1942), aptly stated:

"The command of the state over the owner, the obligations which domicile creates, the practical necessity of associating intangibles with the person of the owner

at his domicile since they represent only rights which he may enforce against others—these are the foundation for the jurisdiction of the domiciliary state to tax." (319 U.S. 96-97)

As heretofore stated, counsel for appellant relies heavily on the decision in the case of *Standard Oil Company* v. *Kentucky, supra.* Commissioner Catterall is criticized for ignoring it. Brief, p. 28. In that case, it was admitted by the taxing authorities of Kentucky that the intangible property sought to be taxed had a business situs (taxable situs) in other States. The decision is largely based on the *Wheeling* case which in turn was founded on the case of *First National Bank* v. *Maine, supra,* notwithstanding the repudiation of the latter. The author of the opinion sought to distinguish between an *ad valorem* tax on intangibles from *succession* or *inheritance* taxes, taxes on transfer of *corporate* stock or *license taxes* measured by the value of the tax, holding that the tax was invalid solely because it was an *ad valorem* tax.

It seems that the Kentucky Court had many years before (1936) held that an *ad valorem property tax* on intangible property of a resident where the intangibles had a business situs in another State was invalid, following *Wheeling Steel* case which had been decided earlier that year (1936).

The Kentucky Court, in the *Standard Oil* case, simply followed its former ruling, apparently ignoring the decision of the Supreme Court of the United States in the case of *Greenhough* v. *Tax Assessors,* 331 U.S. 486 (1947). In that case, the decedent died a resident of New York. His will was probated in that State. Trustees under the will held intangible personalty for the benefit of a named beneficiary for her life. The evidence of the intangible property was in New York. One of the trustees lived in Newport, Rhode Island.

That city made an assessment against one-half of the intangible personal property (corpus of the trust) under the Rhode Island statute for *ad valorem taxes*. The Court sustained the right of the city of Newport to tax. The discussion and determination in the opinion was restricted to the issue presented by appellant's insistence that Rhode Island could not constitutionally collect this tax because the State rendered no equivalent for its exaction in protection of or benefits to the trust fund. In the course of its opinion, the Court stated:

> "* * * But when testamentary trustees reside outside of the jurisdiction of the courts of the state of the seat of the trust, third parties dealing with the trustee on trust matters or beneficiaries may need to proceed directly against the trustee as an individual for matters arising out of his relation to the trust. Or the resident trustee may need the benefit of the Rhode Island law to enforce trust claims against a Rhode Island resident. As the trustee is a citizen of Rhode Island, the federal courts would not be open to the trustee for such causes of action where the federal jurisdiction depended upon diversity. The *citizenship of the trustee* and not the seat of the trust or the residence of the beneficiary is the controlling factor. The trustee is suable like any other obligor. There is no provision of the federal Constitution which forbids suits in state courts against a resident trustee of a trust created under the laws of a sister state. Consequently, we must conclude that *Rhode Island does offer benefit and protection through its law to the resident trustee as the owner of intangibles.* And, while it may logically be urged that these benefits and protection are no more than is offered a resident owner of land or chattels, permanently out of the state the same reasons, hereinbefore stated on page 1627 (331 U.S. 491-3) apply that permit state property taxation of a resident owner of intangibles while denying

a state power to tax similarly the resident's out-of-state realty." (331 U.S. 495-496) (Italics supplied)

We believe that there is a true analogy between appellant and the Rhode Island trustee in the *Greenhough* case. Here, appellant has the right of eminent domain which it has exercised extensively throughout Virginia. Landowners who have had their land taken by appellant must seek redress in the Virginia courts to enforce payment if necessary. The entire assets of appellant, if need be, may be subjected to the payment of such claims. Virginia courts have the authority to compel appellant to apply these assets (held in Georgia and in New York) to the satisfaction of any claim adjudicated against it. Thus, appellant may need the benefit of Virginia law in asserting its right under Virginia law or to defend an action instituted against it in the courts of Virginia. Surely, Virginia offers as much protection to appellant as Rhode Island did to the resident trustee in the *Greenhough* case. Virginia has control over appellant and its intangible property regardless of where the evidence of that property may be. *Central Hanover Bank* v. *Kelley, supra.*

Likewise, the Kentucky Court failed to consider the decision of the *Newark Fire Insurance* case, *supra.* Furthermore, the Kentucky Court attempted to distinguish between direct taxes on property (*ad valorem* taxes), inheritance taxes, taxes on the transfer of corporate stock privilege or license taxes. Regardless of how the taxes are denominated, such taxes are taxes on intangible property. We do not believe that from a constitutional standpoint a line can be drawn delineating one type of intangible property from another. The United States Supreme Court has not gone into such technicalities in tax cases, as illustrated in the case of *Fidelity Casualty Company* v. *Louisville,* 245 U.S. 54, where the Court used this language:

"It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be involved in a case like this. Whichever this tax technically may be, the authorities show that it must be sustained." (245 U.S. 59)

Under the circumstances, we cannot possibly see how this Court would be justified in following the decision of the Kentucky Court in the *Standard Oil Company* case.

Appellant's argument in this connection (A State May Not Tax Intangibles Of Its Corporation That Have Acquired Commercial Domicile Elsewhere) is effectively answered by the Supreme Court of Appeals in its opinion on pages 231 to 232, inclusive, 145 S.E. (2d) on pages 522 to 525, inclusive, 206 Va. and on pages 22 to 26, inclusive, of Appendix A attached to Statement As To Jurisdiction filed by the appellant.

III.

Section 58-588 of the Code of Virginia (1950), as amended, Not Shown to be Unconstitutional.

This Court is asked by the appellant to declare Section 58-588 of the Code contrary to the Fourteenth Amendment.

It is well to consider the statement made by Mr. Justice Frankfurter in the concurring opinion in the *Aldrich* case, *supra*. After citing several sections of the original Constitution limiting the power of the states to tax in some areas, he had this to say:

"* * * None of these limitations touches the power of a State to create corporations and the incidental power to tax opportunities which such State-created corporations afford.

"This phase of the taxing power, rooted in the established practices of the States in common with

> other governments, was not suddenly abrogated on July 29, 1868, when the Fourteenth Amendment became the law of the land. On the contrary, taxes based on the States' power over corporations of their own creation thereafter became an increasingly familiar source of revenue." (316 U.S. 182-3)

The legislature of Virginia has spoken in clear and unequivocal language just what its intent is in this particular.

In cases of this nature, fundamental principles in our system of laws should be followed. The rule that a statute is presumed to be constitutional and a court will not hold a statute unconstitutional unless it is unconstitutional beyond a reasonable doubt, should never be ignored by a court.

In *Ogden* v. *Saunders,* 12 Wheat. 213, 270, 6 L. ed. 606, 625, it said with respect to a state statute:

> "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."

In the case of *Union Pacific Railroad Company* v. *United States,* 99 U.S. 700, 718, 25 L. ed. 496, 501, the court said with respect to an act of Congress:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

CONCLUSION

Appellant on its own volition became a public service corporation incorporated under the laws of Virginia and thereafter exercised the rights and privileges accorded such corporations, which included, among other rights, the power of eminent domain. It now feels that it is aggrieved by the action of the State of Virginia in taxing it in the same manner as other public service corporations of like character are taxed. Appellant states that the payment of such taxes is oppressive. It could hardly be said that the tax of some $160,000 is oppressive to a corporation possessed of some $65,900,000.00 in tangible securities and money in working capital. The Supreme Court of Appeals of Virginia, as well as the State Corporation Commission, did recognize the basic principle relative to the imposition of retroactive taxes and the basic principle relative to the power of a State to tax intangibles as enunciated by this Honorable Court. Appellant has not been treated unfairly by the State of Virginia.

We submit that there was no error committed by the Court. This Court should deny the petition for an appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Response to H. Brice Graves, Esq., Ralph H. Ferrell, Jr., Esq., John W. Riley, Esq., and Richard G. Joynt, Esq., 1003 Electric Building, Richmond, Virginia 23212, Jack Vickrey, Esq., Howard D. McCloud, Esq., and Ross Arnold, Esq., 3390 Peachtree Road, N.E., Atlanta, Georgia, counsel for the appellant, on this 19th day of April, 1966.

D. GARDINER TYLER
Assistant Attorney General

APPENDIX

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CHAPTER 217

An Act to amend and reenact §§ 58-588, as amended, 58-597 and 58-598 of the Code of Virginia, relating to taxes on certain public service companies.

[H 640]

Approved March 10, 1964

Be it enacted by the General Assembly of Virginia:

1. That §§ 58-588 as amended, 58-597 and 58-598 of the Code of Virginia be amended and reenacted as follows:

§ 58-588. Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit natural gas *or crude petroleum and the products or by-products thereof* in the public service by means of a pipe line or pipe lines in this State which pays no State franchise tax on its gross receipts on account of the transmission of such natural gas *or crude petroleum and the products or by-products thereof* shall report annually on or before the fifteenth day of April to the State Corporation Commission all of its real and personal property of every description, tangible and intangible, as of the beginning of the first day of January preceding, showing particularly in what city, town or county and school district therein the property is located. This report shall be itemized as provided for herein. Each such corporation shall also report the total miles of mains located in this State.

The report herein required shall be verified by the oath of the president or other proper officer or person making the same.

This section as amended shall apply to the tax year beginning on January first, nineteen hundred sixty-four and to each tax year thereafter.

§ 58-597. Every corporation coming within the provisions of this article shall pay to the State an annual State

franchise tax on its privilege to exist with the powers aforesaid as a body corporate in this State equal to two hundred and fifty dollars for each county in or through which it is authorized by its charter to locate a pipe line or pipe lines for the transmission of natural gas *or crude petroleum and the products or by-products thereof* in this State, which, with the taxes hereinbefore provided for, shall be in lieu of all State taxes or license charges whatsoever upon the franchises of such corporations, in so far as such franchises relate to the authority to transmit natural gas *or crude petroleum and the products or by-products thereof* by means of a pipe line or pipe lines in this State and the shares of stock issued by it and upon all its property, except as herein provided; provided that nothing herein contained shall exempt such corporation from the annual fee required by section one hundred and fifty-seven of the Constitution or from the county, city, town, district or road levies; and provided, further that nothing contained in this article shall be construed as exempting from liability for a State franchise tax on gross receipts derived from the business of distributing and selling natural gas *or crude petroleum and the products or by-products thereof* in this State any such corporation as comes within this article when such corporation is engaged in the business of selling and distributing natural gas *or crude petroleum and the products or by-products thereof* in this State.

The real estate and tangible personal property of such corporation but not its franchise, shall be assessed on the valuation fixed by the State Corporation Commission, with county, city, town, district and road levies at the same rates as real and personal property of natural persons are assessed with such levies.

This section, as hereinabove amended, shall apply to the tax year beginning on January first, nineteen hundred sixty-

four; but it shall not apply to any succeeding tax year, and for the tax year beginning on January first, nineteen hundred sixty-five and for each tax year thereafter every such corporation coming within the provisions of §58-456 shall pay the franchise tax imposed by that section. § 58-600 shall become inoperative after December thirty-first, nineteen hundred sixty-four.

§ 58-598. No * county, city, town, district or road levy shall be laid on the net income of any such corporation, nor shall any county, city, town, district or road levy be laid on the gross receipts of any such corporation derived solely from the transmission of natural gas *or crude petroleum and the products or by-products thereof.*

Nothing contained in this article shall be construed as exempting any such corporation from the State income tax imposed by Chapter 4 of Title 58 for taxable years beginning after December thirty-first, nineteen hundred sixty-four; and any such corporation shall not be subject to a State gross receipts tax under § 58-603 except to the extent that the receipts of such corporation are derived from the business of distributing and selling natural gas in this State.

This section as amended shall apply to the tax year beginning on January first, nineteen hundred sixty-four and to each tax year thereafter, except that, as to the State income tax, it shall apply to taxable years beginning after December thirty-first, nineteen hundred sixty-four.

2. An emergency exists and this act is in force from its passage.

(NOTE: Italicized portions were added by the 1964 Amendment. Asterick indicates ommissions.)